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Citizen Protest

GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-196040

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February 6, 1980

The Honorable Robert W. Daniel, Jr.
House of Representatives

Dear Mr. Daniel:

This is in response to your letter of December 14, 1979, regarding our decision on the protest of Phoenix Marine Corporation, B-196040, October 23, 1979, 79-2 CPD 283. You enclose a copy of a letter from the protester dated October 29, 1979, addressed to our Office, which requests that we reopen the file and conduct a complete investigation of the procurement practices of the Norfolk [Virginia] Naval Supply Center in making award under the protested solicitation.

You indicate that the protester's letter has not been answered, and express concern that it may have gone astray. This apparently is the case. Neither our computerized record of incoming correspondence nor the protest file itself includes such a letter from Phoenix Marine Corporation (Phoenix).

While it is unfortunate that Phoenix's letter did not reach us sooner, we could not at any time have reopened the file and conducted the type of investigation which Phoenix "requested and expects." It is not our practice, in conjunction with bid protests, to conduct independent investigations to establish the validity of protesters' speculative statements. Courier-Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323. Our Bid Protest Procedures require a protester to state specific grounds of protest with regard to the award of a specific contract. 4 C.F.R. 20.1 (1979). Moreover, when Phoenix's protest is broken down into such grounds, it becomes clear that the issues raised are either untimely or are not ones which our Office reviews.



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For example, Phoenix questions the explanation by the Navy that because of a major change in specifications, which was expected to have an impact on the cost of performance, the solicitation was amended to eliminate a total small business set-aside and to provide that only the back-up contract would be for small business. In its original protest, Phoenix stated that it considered this change "an obvious ploy to circumvent the fact that the apparent low bidder was ineligible and to give them a second chance."

Phoenix argues that since the low bidder was not a small business, Phoenix, as the second-low bidder, should have been awarded the contract under the original solicitation. Any changes in specifications, Phoenix argues, could then have been negotiated. Alternatively, Phoenix contends that the solicitation should have been canceled and a new one issued, so that firms which had not originally bid because they exceeded the size standard could compete for the resolicitation.

There is no dispute that the solicitation was amended after Phoenix challenged the low bidder's size status. In reaching our decision that this ground of protest was untimely, however, we considered the fact that by its own admission, Phoenix received Amendment 0004, canceling the small business set-aside for the primary contract. The amendment specified a closing date of July 6, 1979; however, Phoenix did not protest until September 9, 1979.

Our Procedures require that protests of alleged improprieties which did not exist in an initial solicitation, but which are subsequently incorporated therein, must be filed not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. 20.2(b) (1), supra. Since Phoenix did not protest until more than two months after the closing date specified in the amendment, we could not consider this ground of protest on the merits. Our finding was based upon (1) the rules set forth in our Procedures and (2) the time-date stamp indicating when our Office received Phoenix's protest, and not on any informal contacts with the contracting officer. See generally Linguistic Systems, Incorporated, 58 Comp. Gen. 403 (1979), 79-1 CPD 250.

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The timeliness requirements of our Procedures are not a means of disregarding improper procurement practices. Bid protests are serious matters, which warrant the immediate attention of the protester, the procuring agency, interested parties, and our Office. Our aim is to reach decisions while it is still practicable to recommend corrective action, if warranted, or otherwise to resolve matters without unduly burdening the procurement process or delaying the delivery of necessary supplies and services. See generally Tate Engineering, Inc. -- Reconsideration, B-193904, April 12, 1979, 79-1 CPD 262.

As for whether Empire, the low bidder under the amended solicitation, had the necessary insurance, this is a matter of responsibility. As noted in our original decision, our Office does not review affirmative determinations of responsibility in the absence of a showing of fraud on the part of contracting officials or failure to meet definitive responsibility criteria. In any event, our file contains a copy of Empire's insurance certificate dated September 6, 1979, the day before award.

You further indicate that you believe several items in our decision are in conflict with the facts, and express surprise at our having accepted the Navy's response. We assume you are referring to a dispute between Phoenix and the Navy as to whether the contracting officer received the protest before making award. While Phoenix states that its protest was delivered to the Navy while the contracting officer was at lunch, and that award was made thereafter, the contracting officer told us, by telephone, that he had found Phoenix's protest on his desk more than an hour after he had completed the award documents, and that the protest had no time-date stamp on it.

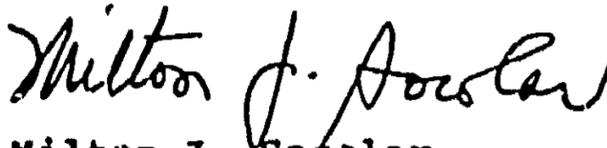
Because it is the protester that alleges improper conduct on the part of an agency, the burden is on the protester to affirmatively establish that there is some substance to the allegations. Obviously, in most cases when the only evidence before us is conflicting statements from the parties, the protester will not have met the burden of affirmatively proving its case. Airwest Helicopters, Inc., B-193277, June 7, 1979, 79-1 CPD 402. Consequently, in such situations we can only conclude that the agency's position has not been shown to be incorrect. That is what happened in this case.

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You also question the fact that we did not give Phoenix an opportunity to comment on the Navy's response. As a general rule in bid protests, we request a fully documented report from the procuring agency and invite the protester and any interested parties to comment on it. However, where the initial submission indicates that a protest is untimely, is without legal merit, or states a basis for protest which will not be considered by our Office, we may issue a decision or dismiss the matter without obtaining such a report. Murphy Anderson Visual Concepts-Reconsideration, B-191850, July 31, 1978, 78-2 CPD 79. These circumstances existed in Phoenix's protest; moreover, as stated in our decision, even if the contracting officer had made award after receiving the protest, this would have been regarded as a procedural irregularity, and would not have provided a legal basis for sustaining the protest. Therefore, no useful purpose would have been served by further development. See Mars Signal Light Company, B-193942, March 7, 1979, 79-1 CPD 164.

I hope this information will be helpful to you. Copies of our Bid Protest Procedures and of the decisions referred to above are enclosed for your convenience.

Sincerely yours,



Milton J. Socolar
General Counsel

Enclosures